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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1923.

15

NO. 40

UNITED STATES OF AMERICA, *et al.*,
Appellants,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, *et al.*,
Appellees.

BRIEF FOR ILLINOIS CENTRAL RAILROAD COMPANY.

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BRIEF FOR ILLINOIS CENTRAL RAILROAD COMPANY.

STATEMENT OF THE CASE.

This case comes to this Court upon the appeal of the United States and the Interstate Commerce Commission from a final decree of the District Court of the United States for the Southern District of Mississippi, entered on the 10th day of February, 1922, (Rec. 180) by the terms of which there was enjoined, cancelled and set aside a

certain order of the Interstate Commerce Commission made in a case known as *Swift Lumber Company* v. *Fernwood and Gulf Railroad Company,* 61 I. C. C. 485. (Rec. 145.)

The case arose in this way:

The Fernwood, Columbia and Gulf Railroad (formerly the Fernwood and Gulf Railroad, by which name it will be herein designated) is a small line extending from Fernwood, Mississippi, on the Illinois Central in an easterly direction to Columbia, Mississippi, a distance of forty-four miles, where it connects with the Gulf and Ship Island Railroad. In its course it crosses and connects with The New Orleans Great Northern Railroad at Tylertown and at Foxworth. On the sketch reproduced at the end of this Brief the line of the Fernwood and Gulf is shown in green, the line of the Illinois Central, in red, and the line of the New Orleans Great Northern, in maroon. The Fernwood and Gulf is an independent railroad, in no way owned or controlled by any other railroad, nor is it in any way owned or controlled by any lumber company or other shipper. It is chiefly engaged in the transportation of forest products, that commodity constituting about ninety-three per cent of its traffic.

One of the stations local to the Fernwood and Gulf is Knoxo, conspicuously shown on the sketch and located between Tylertown and Foxworth. At Knoxo, at the time this controversy arose, was located the mill of the Swift Lumber Company, engaged in the manufacture of yellow pine lumber. It shipped this lumber to numerous interstate destinations, the most important of which were north of the Ohio River and east of the Mississippi. Through rates on this lumber from Knoxo to consuming territory were, generally speaking, two cents per hundred pounds higher than the rates from stations on the Illinois

Central and the New Orleans Great Northern, such as the junction points Fernwood and Foxworth.

On July 2, 1919, the Swift Lumber Company filed a complaint with the Interstate Commerce Commission making the Fernwood and Gulf, Illinois Central, New Orleans Great Northern and a great many other railroads parties defendant, in which complaint the rates on lumber from Knoxo are alleged to be unreasonable under Section 1 of the Interstate Commerce Act in that they are inherently too high, and further that under Section 3 of the Act these rates are unreasonably and unduly preferential of points on the trunk lines such as Fernwood and Foxworth, from which rates were in effect two cents lower than from Knoxo. (Rec. 18.) Answers were filed by the railroads chiefly interested and a hearing was had before one of the Commissioner's Examiners. Briefs were furnished by Complainant and Respondents, and thereafter in due course and in accordance with the practice of the Commission this Examiner made a tentative report (Rec. 138), in which it was recommended that the Complaint be dismissed on the ground that the rates attacked had not been shown to be either unreasonable under Section 1, nor unduly preferential under Section 3 of the Act.

Exceptions to this proposed report were filed by Complainant, and in due course, in accordance with the Commission's rules of procedure, the case was argued orally before a Division of the Commission, consisting of Commissioners Hall, Daniels and Woolley. Thereafter on April 5, 1921, a majority of the Commission, speaking through Commissioner Eastman, held that the rates under attack were not unreasonable under Section 1 of the Act, but were unduly preferential under Section 3, in that these rates were two cents per cwt. higher than the rates from the main line junction points, Fernwood and Foxworth. Three Commissioners, Messrs. Hall, Daniels

and Potter, dissented. At the time the case was decided, Commissioner Woolley, one of the three who heard the argument, had ceased to be a member of the Commission. It will be noted that of the three Commissioners who heard the argument, the two remaining on the Commission were in favor of the Defendants. The case was decided adversely to defendants by members of the Commission, no one of whom heard the argument, all of the members remaining on the Commission who heard the arguments being in favor of Defendants.

Timely application was made by the Defendants for rehearing or reargument, (Rec. 8), in which application Defendants pointed out the injustice of having the case decided by members who had not heard the argument, over the protest of those members who had. A rehearing, or reargument, was urged upon the further ground that the decision was unsupported by the evidence, and involved a misconception of the law. This application was overruled on July 5, 1921, without any further expression of opinion (Rec. 8). The Commission by its order June 24, 1921, extended the effective date of the order from August 5, 1921, to September 5, 1921.

On August 4, 1921, Fernwood, Columbia and Gulf Railroad Company and Illinois Central Railroad Company, two of the defendants in the proceeding before the Commission, filed their Bill of Complaint in the District Court of the United States for the Southern District of Mississippi, that being the judicial district wherein was the residence of the Swift Lumber Company, the party upon whose petition the order of the Commission was made (38 Stat. L. 219). The suit was brought against the United States as provided by the Urgent Deficiency Appropriations Act of October 22, 1913, and notice was given to the Attorney General of the United States and the Interstate Commerce Commission, as required by law.

The bill averred (Rec. 7) that the Swift Lumber Company, complainant before the Commission, by reason of a certain contract, was estopped to seek a reduction in the lumber rates from Knoxo; that the rates fixed by the Commission were confiscatory, particularly as applied to the Fernwood and Gulf; that the last mentioned company is a short line engaged chiefly in transporting forest products, the supply of which is rapidly being exhausted, and that within the comparatively near future this line will find itself with no business in which to engage, and that by reason of this fact, it, the Fernwood and Gulf, is, as a matter of constitutional right, entitled to make a charge for its services sufficiently high to take care of impairment of its investment due to diminishing tonnage; that the findings of the Commission as to undue preference practiced by Plaintiffs were entirely without support in the testimony, and that the Commission therefore, in making the order, acted arbitrarily; that in making the order the Commission exceeded its authority under the law in that Plaintiffs were held responsible for the acts of other carriers in which Plaintiffs had not participated and which were entirely beyond Plaintiff's control; that by its order, the Commission undertook to force Plaintiffs to adopt a policy as to rate-making which was against the interests of Plaintiffs and which Plaintiffs were not required to adopt by reason of any provision of law. To this bill the United States, by the Attorney General, filed a Motion to Dismiss (Rec. 163), the Interstate Commerce Commission an Answer (Rec. 164), and the intervening Complainant before the Commission, a Motion to Dismiss. The application of Plaintiffs for a temporary injunction was heard by agreement at Birmingham, Alabama, on August 18, 1921, the Special Court, organized in accordance with the Statute, consisting of Circuit Judge Walker and District Judges Foster and Grubb. The Court as so constituted issued a temporary

injunction (Rec. 167) restraining the action of the Commission upon condition that the Plaintiffs keep certain records of shipments. The case came on in due course for final hearing at New Orleans, Louisiana, (likewise by agreement) on November 26, 1921, before Circuit Judge Walker and District Judges Grubb and Holmes. Prior to this final hearing, intervenor Swift Lumber Company filed an Answer (Rec. 170). At this hearing there was introduced in evidence the entire record before the Commission. The Court by its Decree of February 10, 1922, (Rec. 180) made the temporary injunction perpetual, thereby in effect setting aside the order of the Commission. From this final decree the United States and the Interstate Commerce Commission prosecute this Appeal.

ARGUMENT.

Scope of This Brief.

The brief is filed on behalf of the Illinois Central Railroad Company. Very largely the argument herein will be limited to questions that concern that line, although necessarily some reference will be made to the situation of the Fernwood and Gulf, co-plaintiff with the Illinois Central. There are, however, certain issues raised by the Bill which relate solely to the Fernwood and Gulf and these questions will be argued in the separate brief to be filed by that line. We purpose to confine our discussion to these points:

1. The Commission, in finding Plaintiffs guilty of undue and unreasonable preference exceeded its statutory powers in that Plaintiffs were held responsible for conditions over which they had no control and which it is beyond their power to remedy.

2. That the Commission in rendering its decision and making its order in this case acted arbitrarily in that its conclusions were wholly unsustained by proof.

As pointed out by this Court in *United States et al.* v. *Louisville and Nashville Railroad Company, et al.*, 235 U. S. 313, these questions are closely related and can perhaps best be considered together.

The Commission's Anomalous Procedure.

In our Statement of Facts we have referred to a curious state of affairs by reason of which the Commissioners participating in the Decision who heard the argument were in favor of these Appellees, but the judgment of these Commissioners was overruled and the case decided by other Commissioners who did not hear the argument. While we are not contending that this method of disposing of the case renders the judgment void, yet we do insist that the procedure was highly irregular, if not unprecedented. It is a well-settled rule, governing the deliberation of all tribunals acting judicially, that when those who did not hear the argument differ in opinion from those who did, a re-argument will be granted as of course. In

Santee River Cypress Lumber Co. v. *Collerton Cypress Co.*, 65 S. E. 826,

it is said:

> "At the time this case was heard on appeal to the Supreme Court, it was composed of four justices, one of whom has since retired. Of the remaining justices, two are of the opinion that the judgment of the Circuit Court should be reversed, while the other is of the opinion that it should be affirmed. Under these circumstances a reargument will be necessary."

See also:

Santee River Cypress Lumber Co. v. *Collerton Cypress Co.*, 66 S. E. 116.
Tindall v. *Columbia Mills Co.*, 67 S. E. 908.
Summerbell v. *Summerbell*, 36 N. J. Eq. 293.
Trast Co. v. *Madsen*, 132 N. Y. Supp. 316.

We insist that the presumptions of correctness that usually attend decisions of the Commission is greatly weakened by the fact that the ordinary rule governing

the action of courts was not followed in this case. Certainly the courts would approach the consideration of this case with much more confidence in the correctness of the decision if the Commissioners deciding against the carriers had heard the argument. The carriers were able to convince the Commissioners who heard them; they should have been given an opportunity to argue to those who were opposed.

Location of Carriers Involved.

We have appended hereto a map or blue print in which we show in colors the lines of railway serving the State of Mississippi mentioned in the Commission's decision. This map shows in *red* the line of the Illinois Central transversing the western part of the State of Mississippi and the eastern part of Louisiana, running north and south. Crossing the main line of the Illinois Central at Hammond, Louisiana, is a branch line extending east and west which branch line is also shown in *red*. In the southern part of the State of Mississippi will be found the line of the Fernwood and Gulf, shown in *green*, extending from Fernwood on the Illinois Central through Tylertown and Foxworth, points on the New Orleans Great Northern to Columbia on the Gulf and Ship Island. On this line will be found Knoxo between Tylertown and Foxworth. Tributary to the Illinois Central appear such small independent lines as the Sardis and Delta and Batesville Southwestern in North Mississippi, Natchez, Columbia and Mobile in South Mississippi, and the Kentwood and Eastern and New Orleans, Natalbany and Natchez in Louisiana. These short lines are colored in *purple*. From points on these independent lines, just as from Knoxo, a point on an independent line, the rates on lumber are higher than from main line points on the Illinois Central.

The line of the New Orleans, Great Northern Railroad extending from Jackson, Mississippi, to New Orleans, roughly parallel with the line of the Illinois Central is shown in *maroon*. Extending from Natchez, Mississippi, on the Mississippi River eastward through Brookhaven, Mississippi, on the Illinois Central, and Wanilla, on the New Orleans, Great Northern, to Hattiesburg on the New Orleans and North Eastern, is an east and west line known as the Mississippi Central, shown on the map in *yellow*. The lines of the Mobile and Ohio, Gulf, Mobile & Northern and New Orleans and Northeastern railroads in Mississippi competitive with the Illinois Central in the transportation of lumber to northern markets are shown in *black*. Appearing in *pink* on this map are certain short lines, viz.: Pearl River Valley, tributary to the New Orleans and North Eastern, Mississippi and Western, tributary to the Gulf Mobile and Northern and Alabama and Mississippi (now abandoned) tributary to the Mobile and Ohio. The reason for calling special attention to these lines of railway, large and small will be manifest.

The Rate Situation.

From points on the Illinois Central in Mississippi south of Jackson rates on lumber to northern destinations are ordinarily the same. In the Commission's opinion reference is made to these rates being "blanketed" from all the pine-producing territory in South Mississippi, but as a matter of fact these rates are not "blanketed" in the ordinary sense of the term. This is true for the reason that while the same rates apply from Illinois Central stations south of Jackson, these rates do not apply from stations on other roads (except the Mississippi Central, for which there is a special reason which we will discuss later). So that in all cases rates from

stations on such independent short lines as the Fernwood and Gulf, New Orleans, Natalbany and Natchez and Natchez, Columbia and Mobile are in every case from one to four and one-half cents higher than rates from Illinois Central stations. The Commission so finds in its opinion in this case. It says:

> "It is not and has not been the practice of defendants Illinois Central and New Orleans Great Northern to extend the junction point or blanket basis of rates on lumber to points on short line railroads in this territory. The Illinois Central and its affiliated line, the Yazoo & Mississippi Valley, connect with eight such short-line carriers and none of them has the blanket rates. Lumber rates exceed the rates from the junction points by arbitraries ranging from 1 to 4½ or 4.5 cents." (Rec. 146.)

It will thus be seen that it has never been the traffic policy of the Illinois Central to extend its junction rates to local points on these independent short line railroads. And it is established in this case, and so found by the Commission, that this policy is the one that generally prevails throughout the territory lying south of the Ohio River and East of the Mississippi. Thus the Commission says:

> "Indeed, the general, although not the universal practice throughout the Southeast appears to be to make rates from local points on independent short lines by adding an arbitrary to the rate from the junction point. There are 95 such carriers in the territory east of the Mississippi and south of the Ohio, referred to in this record, and rates on lumber from local points on these roads are made on the arbitrary basis in 55 cases, on combinations of locals in 27, and on the junction point or blanket basis in but 13." (Rec. 147.)

The order of the Commission in this case requires the carriers to establish the Knoxo rates on the junction-

point basis, holding that any other basis is unlawful and therefore requiring the carriers to abandon a policy which represents the practice in 86% of the cases.

Commission Without Power to Determine Policy.

Since the Commission in the Decision under attack seeks to reverse the settled policy of 86% of the carriers, among whom is this Appellee, and since the Commission is without power to substitute its own ideas as to proper policies for those of the carrier, some basis grounded on the law must be found before the carriers can be forced to abandon this policy of rate-making. For it is still true:

> "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits."
>
> *Interstate Commerce Commission* v. *B. & O. R. R. Co.*, 43 Fed. 37.
>
> (Quoted with approval by this Court in *Cincinnati, New Orleans and Texas Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, p. 197 of opinion.)

That their view so expressed is not an outgrown sentiment is shown by the fact that this Court as late as December, 1921, pointed out the fact that with all the changes in the regulating statutes wrought by the Trans-

portation Act, Section 3, the discrimination statute so-called, remains unchanged and is now in purpose and scope as it was in 1900.

Central R. R. Co. et al. v. *U. S. et al.*, 257 U. S. 247, (page 259, 260 opinion).

It behooves us, therefore, to look closely to the issues in this case, the character of the testimony, the findings of the Commission and the applicable provisions of law to ascertain if the Commission had the power under the statute to compel appellees to cease to charge rates which are found to be reasonable merely because one of the Appellees charges lower rates from its own stations, and participates, under the force of compelling competition in a few other rates over which it has no control.

Theory of Commission.

It is an important fact, always to be remembered in considering this case that the Commission found the rates from Knoxo to be reasonable under Section 1 of the Act. The essential findings of the Commission are thus expressed:

> "We do not find that the rates on yellow-pine lumber, timber, and lumber products in effect subsequent to January 1, 1919, from Knoxo to the destinations in question were intrinsically unreasonable, except that we find that the rates to points in Tennessee, which were made by combination of the local rates to and beyond Fernwood, were unreasonable to the extent that they exceeded the corresponding contemporaneous rates from Fernwood to the same destinations by more than 2.5 cents per 100 pounds.* We do find, however, that subsequent to January 1, 1919, the rates on yellow pine lumber, timber and lumber

* Rates to these Tennessee points are not in issue here, this finding of the Commission as to the unreasonableness of rates to this limited territory having been acquiesced in by the carriers, and the situation corrected.

products from Knoxo to Ohio River crossings, to points in Wisconsin, Minnesota, Iowa, and Missouri, to points in Central and Eastern Trunk Line territories and to points in Tennessee and Kentucky the rates to which are blanketed from points producing yellow pine on the Illinois Central and New Orleans Great Northern railroads south of Jackson, Mississippi, were, and that for the future they will be, unduly prejudicial to Complainant to the extent that they exceed the blanket basis of rates from Fernwood, Tylertown and Foxworth." (Rec. 150, 151.)

We have, then, a case where the carriers are required to abandon a reasonable rate from a point on an independent short line, requiring at best a two line haul, for the reason that one of these carriers maintains a lower rate for a shorter distance involving a one line haul, and quite obviously therefore a less expensive service. On the face of it such a requirement would seem difficult to justify except upon a clear showing of preference.

The Commission's conclusion that such undue preference exists may be said to rest upon two somewhat distinct grounds. The first of these is that the Illinois Central participates in rates from stations on the Mississippi Central (shown in *yellow* on the map) and from stations on the Pearl River Valley, Mississippi and Western and Alabama and Mississippi Railroads (shown in *pink* on the map) on the "blanket" basis of rates, and should therefore be forced to apply that basis to Knoxo, a point on another independent short line, the Fernwood and Gulf. At the outset it should be observed that the rate from Knoxo cannot be reduced or changed in any way without the concurrence of the Fernwood and Gulf. The Illinois Central is, obviously, powerless to change a joint through rate without the concurrence of the other party to the rate. The Commission's order requires the Illinois Central and the Fernwood and Gulf to join in publishing a reduced rate, affecting the revenues of both

upon the ground that one of these carriers, the Illinois Central, participates elsewhere in a similarly reduced rate. No one can pretend that the Fernwood and Gulf is in any way responsible for rates prevailing from stations on railroads like the Mississippi Central or the short lines tributary to the Gulf, Mobile and Northern and other roads. This little road, the Fernwood and Gulf, could never handle any of this lumber. It is a party to no through rates affecting any of this traffic. Upon what rational theory is this short railroad required to shrink its revenue, even if its connection, the Illinois Central, does practice discrimination? The opinion of the Commission nowhere answers this question. But aside from the consideration just stated, the Illinois Central does not violate Section 3 of the Interstate Commerce Act by participating in through rates from Mississippi Central stations, and stations on the short lines shown in *pink* on the map while at the same time refusing to participate in rates on the same basis from Knoxo.

And, first as to the Mississippi Central points.

In its opinion the Commission says:

> "Defendants New Orleans Great Northern and Illinois Central show that the Mississippi Central is now 160 miles in length; that it handles considerable traffic other than lumber; that it had joint rates on the junction-point basis with the New Orleans and Northeastern prior to the establishment of connections with the New Orleans Great Northern at Wanilla, Mississippi, and with the Illinois Central at Brookhaven, Mississippi; and that they were forced to extend the blanket rates to it because of competition." (Rec. 147.)

This statement of the Commission is based upon undisputed evidence (Rec. 94, 95) that the construction of the Mississippi Central (shown in *yellow* on the map) was begun at Hattiesburg, and from there the line was built

west. As soon as enough of the line was finished to permit the beginning of operation, the New Orleans and Northeastern (having a traffic policy different from that of the Illinois Central) joined with the new line in establishing rates from the new line's local stations on the junction point (Hattiesburg) basis. When the line was built to a junction with the New Orleans Great Northern (Wanilla), and later to a junction with the Illinois Central (Brookhaven) these two lines were forced to establish the same basis of rates with the Mississippi Central or else forego any participation in the traffic. And even if the New Orleans and Great Northern and the Illinois Central had refused to join in through rates from Mississippi Central Stations on the junction-point basis the shippers at Knoxo would not have been one whit better off. For shippers at Mississippi Central Stations, if considered competitors of the shipper at Knoxo, would still have had the lower basis of rates *via* Hattiesburg and the New Orleans & Northeastern and connections. And so, now, if the Illinois Central and the New Orleans Great Northern were to withdraw from participating in through rates from Mississippi Central stations to important destination territory to the north, the competitors of the Swift Lumber Company, if such there be, located at these local stations on the Mississippi Central would still have the lower through rates by way of the New Orleans and Northeastern and its numerous northern connections. The ordinary test of discrimination, to use a convenient, short term for the unreasonable and undue preference denounced in Section 3 of the Act, is as stated by the Commission, the

> "ability of one of the carriers participating in the two through routes from the two points of origin to the same point of destination to put an end to the discrimination by its own act."
>
> *Ashland Fire Brick Co. et al.* v. *Southern Ry. Co. et al.*, 22 I. C. C. 115,

the Commission's leading case on this subject. Here it is too clear for argument that the Illinois Central is powerless to prevent, by any action it may take, the securing of the junction basis of rates by shippers located at these Mississippi Central stations, so long as the route *via* Hattiesburg is open to all of them.

Coming, now, to the charge of discrimination based on the Illinois Central's participation in rates from local stations on the short lines of railroad shown on the map in *pink,* it will be noted that none of these lines is tributary to either the Illinois Central or the New Orleans and Great Northern. The Peral River Valley is an adjunct of the New Orleans and North Eastern, the Mississippi and Western, of the Gulf, Mobile & Northern and the Alabama and Mississippi (when in existence) of the Mobile and Ohio. These last mentioned trunk lines in conjunction with their short line connections have seen proper in the exercise of their right to determine their own policies, to establish the junction point basis of rates at stations on these short lines. But neither the Illinois Central nor the Fernwood and Gulf had anything whatever to do with the adoption of this policy, nor is it within their power to bring about any change in this policy by any act of theirs. It is true that the Illinois Central (but not the Fernwood and Gulf) is a party to certain joint through rates whereby traffic originating on these short lines shown in *pink* on the map may move to remote northern destinations, but if the Illinois Central were to withdraw from such tariffs practically all of this traffic could reach the desired destinations by routes in which the Illinois Central does not participate. The Commission recognizes this in its opinion where it says:

> "The Alabama & Mississippi extends from Pacagonla, Mississippi, served also by the Louisville & Nashville, through Evanston, Mississippi, where it

crosses the Gulf, Mobile & Northern, to Vinegar Bend, Alabama, where it connects with the Mobile & Ohio. The Mississippi & Western is a short line which connects with the Gulf, Mobile & Northern at Stevens, Mississippi. The Cybar, Gulf & Northern no longer exists. A part of its line is now owned by the Pearl River Valley, connecting with the New Orleans & Northeastern at Picayune, Mississippi. It is to be observed that none of these roads connects with either the Illinois Central or the New Orleans Great Northern, yet both these defendants concur in joint rates on the blanket basis from local points on these short lines. It appears, however, that if the Illinois Central and the New Orleans Great Northern should refuse to concur in these joint rates, similar rates would still apply to most destinations *via* other routes." (Rec. 147.)

It is clear, therefore, that the charge of discrimination is not made out because the Illinois Central participates in these rates. Much less could such a charge be made against the Fernwood and Gulf which never could, by any stretch of imagination, be conceived of as participating in these rates.

In this connection, we venture to repeat that the Illinois Central, as stated in the Commission's report, has consistently and impartially declined to aid in establishing the junction basis of rates at any local points on short line railroads, tributary to its line.

A careful reading of the Commission's brief in this case rather leads to the conclusion that the writer thereof conceives that the Commission's opinion is not based upon any assumed discrimination practiced by the Illinois Central in connection with rates from Mississippi Central stations and stations on the short lines shown in *pink* on the map, but rather on the theory that because the Illinois Central carries a certain rate from its own stations, which applies from the junction point Fernwood and points south thereof, it must in some fashion

not very clearly set out, establish the same rate in connection with the Fernwood and Gulf from Knoxo, a point off the line of the Illinois Central. Or looking at the problem from another point of view, namely, that of the Fernwood & Gulf, that this short line must in some way force its strong connection, the Illinois Central, to join in a reduced through rate because the Illinois Central applies a lower rate from certain of its stations with which lower rate, obviously the Fernwood & Gulf has nothing whatever to do. We think it can be demonstrated both upon reason and authority that in making this order based as it is upon alleged discrimination under Section 3, the Commission has overstepped the limits of the powers conferred upon it by the Congress.

This Case in Conflict with Prior and Subsequent Decisions of the Commission.

We assert that this case is at war with the current of the Commission's own decisions, rendered both prior and subsequent to the decision in the instant case. As we have said, the leading case before the Commission on this subject is

Ashland Fire Brick Co. et al. v. *Southern Ry. Co. et al.*, 22 I. C. C. 115.

In that case the Commission says:

> "It is true that we have held in cases where joint or proportional rates were made by all of the carriers leading to certain points of destination that it was within our power to end a discrimination as between points of origin by a reduction in the rate from a certain point that was discriminated against. *Indiana Steel & Wire Co.* v. *C. R. I. & P. Ry. Co.*, 16 I. C. C. Rep. 155; *Railroad Commission of Tennessee* v. *Ann Arbor R. R. Co.*, 7 I. C. C. Rep. 418. This principle, however, only has application where the traffic from both groups of origin is *necessarily*

> transported to destination by the same connecting carrier or carriers and where it is possible for the delivering carriers to put an end to the discrimination by the exercise of their power to refuse to enter into preferential joint or proportional rates. * * * The test of the discrimination is ability of one of the carriers participating in the two through routes from the two points of origin to the same point of destination to put an end to the discrimination by its own act."

So in the case known as

> I. & S. Docket 329, Molasses Rates from Mobile, 28 I. C. C. 666,

in which it was contended that the Mobile & Ohio Railroad would be guilty of discrimination as against New Orleans if it established low rates from Mobile to St. Louis, the Commission said:

> "Respondent does not reach New Orleans, and cannot publish a rate from that point without the concurrence of connecting carriers which reach New Orleans. Inasmuch as the respondent is in such a position that it cannot by its own authority establish a rate from New Orleans to St. Louis, although it is willing to join in a 15-cent rate from New Orleans to St. Louis on both domestic and imported blackstrap, it cannot be said that it subjects shippers at New Orleans to undue prejudice or disadvantage within the meaning of Section 3 of theAct." (See p. 669.)

This language of the Commission is exactly applicable here. Just as the Mobile & Ohio does not reach New Orleans, so the Illinois Central does not reach Knoxo, and cannot publish a rate from that point without the concurrence of the Fernwood & Gulf. It is not, therefore, in a position, by its own act, to remove the so-called discrimination, and cannot as a matter of law be thereby convicted of giving an undue preference. On the other hand, the Fernwood & Gulf has nothing to do with rates

that are alleged unduly to prefer other points, and cannot lawfully be made a party to a discrimination order.

In

Hughes Creek Coal Co. et al. v. *Kanawha & Michigan Ry. Co. et al.*, 29 I. C. C. 671, the Commission says after citing certain cases:

> "The test of discrimination we find in these cases is the ability of one of the carriers participating in the two through rates to put an end to the discrimination by its own act. It is testified here that the Chesapeake and Ohio Lines have the same joint rates to the Kanawha and Michigan destinations in question by a number of lines other than the Kanawha and Michigan, and that consequently if the Kanawha and Michigan were to withdraw its participation from the joint rates in question, substantially the same advantage would be enjoyed by the Chesapeake and Ohio operators. Under the circumstances, therefore, the Kanawha and Michigan has no such control of the situation as would justify a holding that it is guilty of undue discrimination by participation in the rates." (p. 680.)

See also:

Railroad Commission of Kansas v. *A. T. & S. F. Ry. Co.*, 22 I. C. C. 407.

Richmond Chamber of Commerce v. *Seaboard Air Line Ry. Co.*, 44 I. C. C. 455.

These cases and many others that might be cited show that prior to the decision in the instant case, the Commission had steadfastly recognized the limits upon its authority, and had correctly interpreted the law in line with certain principles laid down by this Court in cases to which we shall presently refer. And curiously enough, even since the rendition of the instant decision, the Commission has repudiated the doctrine there announced, and has recurred to its former standards. We have a

striking instance of this in a case just decided, reported under the name and style of

> *State of Idaho, ex rel Public Utilities Commission,* v. *Oregon Short Line R. R. Co. et al.,* 83 I. C. C. 4,

where it is said:

> "The mere showing that rates from one point in a territory are higher than rates, blanketed or not, from other points in that territory, whether maintained by the same carrier or by different carriers, does not establish undue prejudice or preference. Here the points alleged to be unduly preferred are on defendant's line. The points alleged to be subjected to undue prejudice are local to the traction line. Defendant does not, and cannot without the co-operation of the traction line, establish the rates from those points. The traction line is willing to join in establishing the blanket rate from the points which it serves provided it continues to receive its full revenue for its local haul. Thus, on a shipment from Meridian or Boise, points common to both lines, defendant now receives the entire blanket rate, but if the shipment were made from a point local to the traction line, intermediate between Meridian and Boise, defendant would receive only what is left of the blanket rate after paying to the traction line a division equal to the full local rate of the latter. That local rate is now paid by the shipper. The financial condition of the traction line is unfavorable. During 1921 it failed to earn operating expenses and interest on its funded debt by more than $54,000. Its general manager testified that its rates were established on a low basis due to the fact that the blanket rates did not apply to or from points local to its line.
>
> "Upon this record we find that the rates assailed are not unreasonable or unduly prejudicial. The complaint is dismissed."

This is the sound and true doctrine. And it may be said in passing that the condition of the traction line

described in the report is certainly no worse than that of the Fernwood & Gulf as shown by the evidence and as pointed out in the brief filed in this Court by that line.

Indeed we venture the assertion that the instant case is unique among the decisions of the Commission unless an exception is found in the *Wyoming Railway Company case,* No. 38, argued and submitted in connection with this case. It is true that the Commission in the instant case refers as authority to the case of

> *McGowan Foshee Lumber Co.* v. *F. A. & G. R. R. Co.,* 43 I. C. C. 581; 51 I. C. C. 317,

and one of the dissenting Commissioners refers also to:

> *Whitewater Lumber Co.* v. *A. C. Ry.,* 53 I. C. C. 278,

and

> *Ladd & Co.* v. *Gould Southwestern Ry. Co.,* 36 I. C. C. 179.

But an examination of these cases will readily disclose their inapplicability. In the *Ladd case,* as pointed out in the dissenting opinion of Commissioner Daniels (Rec. .....) it was the settled policy of railroads west of the Mississippi River, in which territory this case arose, to extend the junction point rates to points on independent short lines, and the Commission's decision did no more than to require the carriers to put the Complainant on a parity with others. In the *Whitewater case,* as a reading of the decision shows, the Mobile & Ohio, the trunk line, had voluntarily extended the junction rates to points on independent short lines, but had refused to do so for complainant, located on a short line, the Alabama Central. No such situation exists here. Considered superficially, the *McGowan-Foshee case* may have points of resemblance with this case, but a close examination discloses marked points of dissimilarity. This case dealt

with the rates from Falco, Alabama, which is the northern terminus of a short line known as the Florida, Alabama and Gulf Railroad. This railroad connected with the Louisville & Nashville at Galliver, Florida, 26 miles from Falco. The rates from Falco were 3¼ cents higher than the rates from Galliver, the junction point. The Commission held that the rates from Falco should not be higher than the rates from Galliver, the junction point. It appears that the Louisville & Nashville Railroad, in the opinion of the Commission, had failed to establish that it was its settled policy not to extend the junction rates to the interior. Notice this language of the Commission:

> "In explanation of its participation in joint through rates on the blanket basis from points on the Gulf & Ship Island, New Orleans Great Northern, Mississippi Central, New Orleans, Mobile & Chicago, Central of Georgia, Atlantic Coast Line, and Seaboard Air Line Railroads, and not from Falco on the Florida, Alabama & Gulf, the Louisville & Nashville contends that the first named lines are trunk lines and should be considered in a different category from the last named line. It contends that these so-called trunk lines have direct connection with one or more other trunk lines reaching the Ohio River, and that the Louisville & Nashville is therefore compelled by competition to participate in the blanket basis. On this question, however, the record does not show as to all the originating lines above named whether, in participating in the blanket basis from points thereon, the Louisville & Nashville is meeting the competition of other trunk lines, or the other trunk lines the competition of the Louisville & Nashville." (pp. 585, 586.)

In the case at bar the testimony clearly shows, and the Commission in fact finds, that neither the Illinois Central nor the Fernwood and Gulf is or can be responsible for the rate structure that prevails from Mississippi

Central points, and from points on the short lines in question.

However, the principal distinction perhaps between the instant case and the *McGowan-Foshee case* is that in the last named case the Commission found the rate from Falco to be unreasonable in and of itself. Thus it is said by the Commission:

> "We further find that the rates on yellow pine lumber from Falco to the destination in question are, and since January 1, 1916, have been, unreasonable and unduly prejudicial to complainant to the extent that they exceed or have exceeded the rates from Galliver by more than 2 cents per 100 pounds, and that for the future they will be unduly prejudicial to complainant to the extent to which they exceed the blanket basis of rates from Galliver to the same destinations." (p. 587.)

We see, therefore, that the Commission in this case has blindly followed the *McGowan-Foshee case,* a case of doubtful authority under the law, and in any event, one in which the findings of the Commission were entirely different; for it must be remembered that in the instant case the rate from Knoxo was found to be reasonable. Thus the Commission says:

> "We do not find that the rates on yellow pine lumber, timber and lumber products in effect subsequent to January 1, 1919, from Knoxo to the destinations in question, were intrinsically unreasonable." (Rec. 150.)

The Law as Announced by the Supreme Court.

We call attention to a few outstanding cases, construing the Discrimination Section of the law, and laying down the general principle that the Interstate Commerce Commission cannot, on the ground of discrimination, condemn reasonable rates established by a carrier where

the discrimination is not the fault of the carrier and cannot be removed by the carrier through its voluntary act.

The leading case on this subject is:

East Tennessee, Virginia & Georgia Ry. Co. v. *Interstate Commerce Commission,* 181 U. S. 1.

The opinion is by Justice White. It is one of the most careful and comprehensive interpretations of the power of the Commission under the Third Section of the Interstate Commerce Act that can be found. The case arose on the complaint of the Board of Trade of Chattanooga, it being asserted by the commercial interests of that City that the carriers, in making rates from eastern territory to Chattanooga, discriminated against that City in favor of Nashville; that the traffic moved to Nashville through Chattanooga, when it moved over certain southern lines, and that under the long and short haul clause, (the Fourth Section,) it was a violation of law for the carriers to apply lower rates to Nashville, a more distant point, than to Chattanooga, a nearby point. The facts showed that the rates to Nashville from this eastern territory were controlled by carriers operating over the northern route through Cincinnati to Nashville. The L. & N. did not reach Chattanooga and had no interest in that traffic.

Before the case was finally decided, the Supreme Court, in another case, had held that the prohibition of the long and short haul clause applied only when circumstances and conditions were the same. It was conceded, therefore, on all sides that the action of the southern carriers serving Chattanooga in applying lower rates to Nashville than to Chattanooga did not violate the long and short haul clause as it stood then. It was argued however, by the Chattanooga shippers that under the Third Section—the Discrimination Section—it was unlawful for the southern carriers to apply lower rates to

Nashville than to Chattanooga. Much of the decision is based on this contention. Mr. Justice White, in discussing this, uses this language:

> "In a supposed case when, in the first instance, upon an issue as to the violation of the Fourth Section of the Act, it is conceded or established that the rates charged to the shorter distance point are just and reasonable in and of themselves, and it is also shown that the lesser rate charged for the longer haul is not wholly unremunerative and has been forced upon the carriers by competition at the longer distance point, it must result that a discrimination springing alone from a disparity of rates cannot be held, in legal effect, to be the voluntary act of the defendant carriers, and as a consequence the provisions of the Third Section of the Act, forbidding the making or giving of an undue or unreasonable preference or advantage will not apply. The prohibition of the Third Section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of, as having given undue preference, and does not relate to acts, the result of conditions wholly beyond the control of such carriers." (p. 18.)

Again Judge White says:

> "Indeed the findings of fact made by the Commission in this case leave no room for the contention that either undue preference in favor of Nashville or unjust discrimination against Chattanooga arose merely from the act of the carriers in meeting the competition existing at Nashville. The Commission found that if the defendant carriers had not adjusted their rates to meet the competitive condition at Nashville, the only consequence would have been to deflect traffic at the reduced rates over other lines. From this it follows that, even although the defendant carriers had not taken the dissimilarity of circumstances and conditions into view, and had continued their rates to Nashville just as if there had been no dissimilarity of circumstances and conditions, the preference in favor of Nashville growing

out of the conditions there existing would have remained in force, and hence the discrimination which thereby arose against Chattanooga would have likewise continued to exist. In other words, both Nashville and Chattanooga would have been exactly in the same position if the long and short haul clause had not been brought into play." (p. 19.)

Again Judge White says:

"Applying the principle to which we have adverted to the condition as above stated, it is apparent that if the carrier was prevented under the circumstances from meeting the competitive rate at Nashville, when it could be done at a margin of profit, it would produce the very discrimination which would spring from allowing the carrier to meet a competitive rate where the traffic must be carried at an actual loss. To compel the carriers to desist from all Nashville traffic under the circumstances stated would simply result in deflecting the traffic to Nashville to other routes, and thus entail upon the carriers who were inhibited from meeting competition, although they could do so at a margin of profit, the loss which would arise from the disappearance of such business, without anywise benefitting the public." (p. 20.)

This case has been often cited, and its authority remains unshaken. It must be so, since it rests upon the plainest dictates of reason, and the most ordinary canons of common sense. This case has recently been cited with approval.

Central R. R. Co. etc., v. *United States et al., supra.*

In the case of

Interstate Commerce Commission v. *Diffenbaugh*, 222 U. S. 42.

there was involved the question of whether the carriers were guilty of undue discrimination because they paid

certain elevator allowances at Omaha did not pay similar allowances at St. Louis. Certain carriers served Omaha and not St. Louis. Certain other carriers served both cities. The practice of paying elevation allowances originated at Omaha on the line of the carriers that did not serve St. Louis. The Commission held that the St. Louis carriers were guilty of discrimination because they paid allowances at Omaha and not at St. Louis, these two markets being considerably in competition. The Supreme Court overthrew the decision of the Commission, using this language:

> "The Union Pacific made the allowance in question to elevators at its *termini*. It had no motive to make them anywhere else. The competitors of the Union Pacific concerned in the *Diffenbaugh case* were compelled by competition to make the same allowance at Missouri River points, but they also made it nowhere else. The Traffic Bureau Merchants Exchange of St. Louis complained to the Commission that the result was a discrimination against St. Louis of ¾ of a cent per 100 pounds. But the principle of the decision is that the allowance to elevators upon their own grain is to be stopped everywhere unless they are prevented from using the opportunity for treating their grain. Therefore, this question of preference between the cities does not need to be discussed. But as remarked below, the Union Pacific could not be complained of on this ground, 176 Fed. Rep. 424, and it would be impossible to deny the same right to competing roads merely because as the result of the conditions one side would gain and another lose. *Louisville & Nashville Railroad Co.* v. *Behlmer*, 175 U. S. 648." (See p. 48 of the opinion.)

In the case of:

> *United States* v. *Baltimore & Ohio Ry. Co.*, 231 U. S. 274,

commonly known as the "Sugar Lightering Case," where the Commission had found that the carriers were guilty

of discrimination because they paid allowances for lightering sugar from the plant of Arbuckle Brothers, within the lighterage limits, while at the same time refusing to pay an allowance for lightering sugar from the Federal Sugar Refining Company, beyond the lighterage limits, the Court overruled the decision of the Commission and held that there was no evidence in the Record of a substantial nature to warrant the finding of the Commission, in view of the fact that circumstances and conditions surrounding the movement from the Federal Sugar Refining Company were different from those surrounding the movement from the plant of Arbucle Brothers.

A case very much in point is

Philadelphia & Reading Ry. Co. v. *United States et al.*, 240 U. S. 334.

In that case it appeared that the Commission had made an order that the Philadelphia & Reading Railway was guilty of undue discrimination for the reason that it maintained a rate of $1.35 on cement from Evansville, Pennsylvania, to Jersey City. Evansville is a local point on the Reading, and the Reading extends from Evansville to Allentown, where it delivers the traffic to some one of its numerous connections. It appeared that these connecting lines maintained a rate of 80 cents from mills on their rails in the neighborhood of Evansville, to Jersey City. However, the Reading Railroad does not participate in this 80-cent rate. The Court will observe that this is precisely the state of facts that exists in the case at bar. If we substitute the Fernwood & Gulf for the Reading, we have the precise situation, for the Fernwood & Gulf does not participate in any rate carried by the Illinois Central from points on its line. The Commission having condemned the $1.35 rate maintained by the Reading, the Supreme Court overruled its decision, pointing out the fact that the $1.35 rate was not declared

unreasonable, nor was there any finding as to the reasonableness, either intrinsic or relative, of the 80-cent rate. The Court says:

> "If a universal rate of $1.35 could not justly be complained of by the locality, certainly it is not discriminated against or unlawfully prejudiced because, failing to agree, most of the carriers have established an 80-cent schedule." (p. 341.)

This case is particularly applicable to so much of the Commission's conclusion as is based upon the view that the Illinois Central is guilty of discrimination in maintaining lower rates from its own stations than prevail from Knoxo. The principles underlying all the essential features of this case are settled in the recent case of

Central R. R. Co. v. *United States,* 257 U. S. 247.

In that case the decision in which is so recent and familiar that extended comment is unnecessary, the Court set aside a finding of discrimination made by the Commission under Section 3 of the Act, on the ground that carriers in northern territory against whom the Commission's order ran were in no way responsible for the grant of the creosoting in transit privilege, allowed by carriers in southern territory, and that the mere fact that carriers both North and South were parties to joint through rates carrying the material which was the subject of the privilege, did not make the northern carriers responsible for the acts of their southern connections. This case puts to rest the "partnership" theory as applied to railroads joining in the establishment of through rates. As the Court says:

> "But participation merely in joint rates does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination; as where a lower joint rate is given to one

locality than to another similarly situated. *Penn Refining Co.* v. *Western New York & Pennsylvania R. R. Co.*, 208 U. S. 221, 222, 225. Compare East *Tennessee, Virginia and Georgia Ry. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 18.

If this were not so, the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts of its connecting carriers. If that rule should prevail, only uniformity in local privileges and practices or the cancellation of all joint rates could afford to carriers the assurance that they were not in some way violating the provisions of No. 3. What Congress sought to prevent by that section, as originally enacted, was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same carrier or carriers. Neither the Transportation Act, 1920, February 28, 1920, C. 91, 41 Stat. 456, nor any earlier amendatory legislation has changed, in this respect, the purpose or scope of No. 3."

This language is most significant. It is no answer to this statement of a broad general rule to say, as the Commission says in its brief, that this decision deals only with local practices. It is an emphatic announcement of a wholesome, general rule that a carrier cannot be adjudged guilty of granting unlawful preferences, if it is in no way responsible for such preferences. The decision goes further. It rejects as utterly unsatisfactory, illusory and impracticable the suggestion that a carrier in no way to blame for a discrimination shall nevertheless withdraw from all joint through rates with the responsible carriers, thereby disrupting the rate structure, depriving the public of needed through rates and yet leaving the complaining shipper in no way better off. In the instant case, the undue preference, if it exists at all grows out of:

First, participation by the Illinois Central in lower rates from Mississippi Central points than from Knoxo.

But for this the Fernwood & Gulf is in no way responsible, and if the Illinois Central withdraw its participation, the traffic would still move *via* Hattiesburg and the New Orleans and Northeastern Railway at the lower rates. The situation of the Swift Lumber Company would be in no way improved.

Second, participation by Illinois Central in through rates from small railroads shown in *pink* on the map. But the Fernwood & Gulf does not participate in any way in such rates, and furthermore, if the Illinois Central withdraw from these joint tariffs, the traffic would move at the present rates *via* routes other than the Illinois Central, and the Swift Lumber Company would be no way bettered.

Third, maintenance by the Illinois Central of lower rates from its own stations than the joint rates from Knoxo. But obviously the Fernwood & Gulf has nothing to do with these Illinois Central rates, and is powerless to change them. On the other hand, the Illinois Central has no power to change the Knoxo rate except by the concurrence of the Fernwood & Gulf. It is of the essence of a discrimination order that the carrier be left free to remove the discrimination by one of three methods: the high rate may be reduced to the level of the low rate, or the low rate may be raised to the level of the high rate, or the two rates may be changed to meet at some intermediate point.

> *American Express Co.* v. *Caldwell,* 244 U. S. 617, 624.

Since it is impossible for the Knoxo rate to be lowered, without involving an innocent party, namely, the Fernwood & Gulf, it is clear that, in effect, the Commission's order does not allow any alternative. The only thing that can be done is to increase the rates from Fernwood.

It is suggested in the brief of the Commission that this may be the remedy. But if this is done, all the rates from points south of Fernwood would have to be increased to avoid violations of the Long and Short Haul provision of the Fourth Section of the Act. In other words, this method of removing the so-called discrimination would utterly disrupt the so-called blanket adjustment of rates applying from the yellow-pine producing territory south of Jackson, Mississippi. It is extremely unlikely that the Commission would require, or indeed permit, the Illinois Central to increase these rates, thereby putting rates from Fernwood and points south on a substantially higher basis than prevails from other parts in this producing territory. Compare

Central Yellow Pine Assn. case, 10 I. C. C. 505.
Tift v. *Southern Railway,* 10 I. C. C. 548.
Norman Lumber Co. v. *L. & N. R. R. Co. et al.,* 25 I. C. C. 565.
I. & S. Docket, 520, 34 I. C. C. 652.
I. & S. Docket, 545, 42 I. C. C. 548.

In these cases the Commission has, in most elaborate fashion, considered the rates from this territory of production, particularly in relation to rates from competitive origin territory, and it is certain that a rate adjustment of great importance, affecting a large tonnage, and most delicately balanced, was not meant to be torn to pieces in this casual, incidental, indirect fashion. The fact is that the Commission's opinion is merely an attempt to force the Illinois Central to alter its settled policy. That policy is that it will not extend junction point rates to local stations on independent short lines, unless this extension is necessary to provide reasonable rates. Other railroads in the Southeast have a different policy, but we submit that the Commission is without power to force this policy upon the Illinois Central, in the absence

of a finding of unreasonableness in the rates, and in the absence of those factors which justify a finding of discrimination.

It is said in the *Central R. R. Co. case, supra*:

> "They can, it is true, equalize conditions by establishing the privilege at Newark. But to do so would involve departure from a policy to which they have steadfastly adhered and adhesion to which was held by the Commission not to be unreasonable. If they should establish the privilege at Newark, they would act contrary to their judgment and would adopt a practice which some connecting carriers had introduced without their concurrence or consent, and which may hereafter upon appropriate inquiry be held by the Commission to be unjust and unreasonable."

So here the rates from Knoxo cannot be reduced without the consent of the Fernwood & Gulf, a road in no way even remotely responsible for unduly preferring Fernwood and any effort of the Illinois Central to increase the Fernwood rate would almost certainly lead to condemnation by the Commission.

The Cotton Belt Case.

The Commission relies upon

St. Louis Southwestern Ry. Co. v. *United States*, 245 U. S. 136, 144.

This case was referred to and distinguished in the creosoting case. It is obvious that this case deals with a situation which is altogether different from the one in the case at bar. In the *Cotton Belt case* unreasonable joint through rates were in effect from Arkansas "Blanket" territory to Paducah *via* both Memphis and Cairo. The very substance of the decision was the fact

that the Paducah rates were found unreasonable. The Court says:

> "Furthermore, the order in the case at bar is not merely one to prevent discriminations. Orders to remove discrimination, as commonly framed do not fix rates. They merely determine the relation of rates, by prohibiting the carrier from charging more for carriage to one locality than under similar conditions to another; and they usually leave the carriers free to remove the discrimination either by raising the lower rate or by lowering the higher rate or by doing both. *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624. The order here complained of gives the carriers no such option. It directs that the rates to Paducah shall be 'not in excess of the rates at present in effect from the same points or groups to Cairo, Ill.' In other words, the Commission having found the 22-cent rate unduly high, reduces it to 16 cents, by establishing joint through rates. The injury resulting from discrimination was doubtless the reason which induced the Paducah Board of Trade to institute the proceedings; and the Commission may have considered the existence of the lower rate to Cairo persuasive evidence that the 22-cent rate to Paducah was unreasonably high and the resulting discrimination strong reason for establishing the 16-cent joint rate. But the order is strictly one under Sec. 15 of the Act to Regulate Commerce to reduce existing through rates by establishing joint rates, or, in the alternative, to establish new through routes with joint rates. It is not primarily an order to remove discrimination in violation of Section Three." (pp. 144, 145.)

Fernwood & Gulf Participation in Rates from Fernwood.

It is suggested by the Commission that the Fernwood & Gulf is a party to the discrimination for the reason that this line handles traffic from Fernwood *via* its line and the New Orleans Great Northern and traffic from Tylertown and Foxworth *via* its line and the Illinois Central. But this feature provides nothing but a techni-

cal point. For it is obvious that if the Fernwood & Gulf is to get any business from any one of these three points, it must meet the competition of the trunk lines serving these points. And this fact has been recognized by the Commission, in that authority has been given to the Fernwood & Gulf to publish the junction rates from these points without reference to the Long and Short Rule of the Fourth Section of the Act. (Rec. 89). In other words, the Commission has by its orders in this matter, in effect held that there is no discrimination in the fact that Knoxo and intermediate points, carries a higher rate than Fernwood *via* the Fernwood & Gulf and connecting lines. And this Court has held in substance that the qualified prohibitions in the Fourth Section of the Act represents one special form of discrimination and preference denounced by Sections Two and Three of the Act.

United States v. *A. T. & S. F. Ry. Co.*, 234 U. S. 476,

and cases cited in that opinion. In other words, it is not conceivable that the Commission would have permitted the Fernwood & Gulf to do an act under the Fourth Section which was unlawful under the Third Section. And indeed, the decision of the Commission in this case rests upon no such theory.

Upon no view of the case, can the order of the Commission be upheld.

Respectfully submitted,

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